

April 21, 2016

**VIA ELECTRONIC FILING**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: *Ex Parte* Letter – *Improvements to Benchmarks and Related Requirements Governing Hearing Aid-Compatible Mobile Handsets*, WT Docket No. 15-285; *Amendment to the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets*, WT Docket No. 07-250.

Dear Ms. Dortch:

Competitive Carriers Association, CTIA®, the Hearing Loss Association of America, the National Association of the Deaf, Telecommunications for the Deaf and Hard of Hearing, and the Telecommunications Industry Association (collectively, the "Parties"), representing people who use hearing aid devices and the wireless industry, hereby submit this *ex parte* letter to supplement the historic Consensus Proposal presented by the Parties in November 2015.<sup>1</sup> The Parties have worked together for many years to ensure that wireless handsets are accessible to and usable by people who use hearing aid devices, and we are pleased to continue our ongoing collaboration on this important issue.

The Consensus Proposal, which the Commission thoughtfully incorporated into its Notice of Proposed Rulemaking in these proceedings,<sup>2</sup> struck a careful balance between the goal of hearing aid compatibility for all wireless handsets and the need to encourage continued innovations that can benefit all consumers, including those who use hearing aid devices. The Parties continue to urge the Commission to adopt the Consensus Proposal as submitted. The Consensus Proposal includes the enhanced benchmarks as well as the goal that 100% of wireless handsets offered to consumers be compliant with the Commission's hearing aid compatibility rules within eight years of the effective date of the rules adopting the revised compliance benchmarks, subject to a

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<sup>1</sup> See Letter from James Reid, Telecommunications Industry Association, Scott Bergmann, CTIA, Rebecca Murphy Thompson, Competitive Carriers Association, Anna Gilmore Hall, Hearing Loss Association of America, Claude Stout, Telecommunications for the Deaf and Hard of Hearing, and Howard A. Rosenblum, National Association of the Deaf, to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 07-250, 10-254 (filed Nov. 12, 2015) ("Consensus Proposal").

<sup>2</sup> See *Improvements to Benchmarks and Related Requirements Governing Hearing Aid-Compatible Mobile Handsets; Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets*, Fourth Report and Order and Notice of Proposed Rulemaking, 30 FCC Rcd 13845 (2015) ("NPRM").

determination by the Commission that reaching the goal is achievable considering technical and market conditions.<sup>3</sup>

In the spirit of continued collaboration, the Parties here provide the Commission with additional details surrounding the recommended multi-stakeholder task force process.<sup>4</sup> This task force is intended to bring together all relevant stakeholders with the purpose of identifying questions for exploration, collecting concrete data and information about the technical and market conditions involving wireless handsets and the landscape of hearing improvement technology, and issuing a report to the Commission that will inform the Commission's determination regarding the achievability of 100% compliance with the hearing aid compatibility rules. Below we provide agreed-upon details of this multi-stakeholder task force and the issues that should be considered within the scope of these proceedings.

### **Task Force Participants**

As indicated in the Consensus Proposal, the Parties have committed to work together to ensure that the multi-stakeholder process will include all relevant stakeholders. By providing for broad participation, the Parties can better ensure that an appropriate balance is struck between the need for advancing the availability of Hearing Aid Compatible ("HAC") wireless handsets for consumers who use hearing aid devices and promoting continued innovation throughout the wireless industry for the benefit of all consumers. The Parties should work together to determine the appropriate task force participants within two years of the effective date of the rules adopting the revised compliance benchmarks. At a minimum, the task force participants should include representatives of consumers who use hearing aid devices, research and technical advisors, wireless industry policy and technical representatives, and hearing aid manufacturers. However, lack of participation by any task force member will not prevent the task force from proceeding with its work on the schedule provided. Moreover, the task force will use its best efforts to reach consensus and will reflect the views of the majority of all participants while also providing an opportunity for any minority views to be expressed.

The task force determination process will be a significant administrative undertaking. Once the task force is formed, the task force participants will determine the ongoing leadership who will ensure that the task force works efficiently and effectively toward its stated goal. The task force should be overseen by a group with technical, legal, and administrative expertise to help manage a consensus-based process that will make a recommendation as to the achievability of a 100% HAC compliance requirement, while carefully weighing the needs of both the wireless industry and consumers, including those who use hearing aid devices.

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<sup>3</sup> Consensus Proposal at 2. The Parties agreed that any new benchmarks resulting from the Commission's determination, including 100% compliance, shall go into effect no less than 24 months after the Commission's "achievability" determination. *Id.*

<sup>4</sup> *Id.* at 1 ("[The Parties] reserve the right to modify and refine these terms and to address other issues through further dialogue and collaboration where possible.").

The proposed task force would be convened with the Parties and utilized by all relevant participants in the multi-stakeholder process.<sup>5</sup> The creation of the proposed task force is an endeavor initiated by the Parties, separate from the Commission. Moreover, the Parties will not rely on the Commission for management or funding of the task force's operations.<sup>6</sup> The Parties would expect the task force to file the report in the above-captioned dockets for public comment and the Commission's consideration.

### **Timeline for Task Force Action**

As previously agreed, the task force process is designed to provide for collection of concrete data and information about the then-existing technical and market conditions involving wireless handsets and the landscape of hearing improvement technology in years four and five.<sup>7</sup> In advance of the official start of the determination process in year four, the Parties agree that steps can and should be taken that can inform the task force's ultimate recommendation to the Commission.

In particular, within two years, but no later than the start of year four, the multi-stakeholder group should be formed through outreach to relevant stakeholders to gain their commitment to participate throughout the process. Once established, and in order to ensure expeditious and thorough review of the issues, the task force should convene at least twice annually, or more frequently if needed, prior to the start of year four to begin developing questions for consideration. By developing questions and exploring the scope of the issues prior to year four, the task force can immediately begin collecting concrete data relating to those issues starting in year four that can inform the ultimate report to the Commission. The task force leadership will determine the most effective management of activities, including the need for subcommittees and working groups.

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<sup>5</sup> See Federal Advisory Committee Act § 3(2), Pub. L. 92-463, 86 Stat. 770 (1992) (codified at 5 U.S.C. app. 2 § 3(2)); see also Pub. L. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. app. 2 § 1 et seq.). The proposed task force would not be subject to the Federal Advisory Committee Act ("FACA") because it would not be "established" or "utilized" by the Commission within the meaning of FACA; see also Federal Advisory Committee Act Amendments of 1997, Pub. L. 105-153, 111 Stat. 2689 (1997).

<sup>6</sup> See, e.g., *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 457-58 (1989); see also *Byrd v. Env'tl. Prot. Agency*, 174 F.3d 239, 246 (D.C. Cir. 1999) (noting that "the utilized test is a stringent standard, denoting something along the lines of *actual management or control* of the advisory committee") (quotations omitted, emphasis in original); *Food Chemical News v. Young*, 900 F.2d 328, 333 (D.C. Cir. 1990) (finding that a panel advising an organization that advised the Food and Drug Administration on food safety was not an advisory committee subject to the FACA because the panel was neither established by the FDA nor amenable to any management by FDA officials); *Freedom Watch, Inc. v. Obama*, 930 F. Supp. 2d 98, 101 (D.D.C. 2013) ("[a]n advisory panel is established when it has been formed by a government agency, and utilized if it is 'amenable to . . . strict management by agency officials.'" (quoting *Heartwood, Inc. v. U.S. Forest Serv.*, 431 F. Supp. 2d 28, 34 (D.D.C. 2006))).

<sup>7</sup> Consensus Proposal at 2.

The task force should take all reasonable steps to file its report with the Commission by no later than the end of year six. After the recommendation is made to the Commission, the task force should disband. The Commission should – as expeditiously as possible – seek public comment on the report's recommendations and issue its determination as to whether 100% HAC-compliance for wireless handsets is achievable. Any new requirements resulting from that determination shall go into effect no less than 24 months after such determination is made.<sup>8</sup>

### **Issues for Task Force Consideration**

Although not exhaustive, the Parties believe that the issues outlined below should be properly considered by the multi-stakeholder task force as questions for exploration in years four and five after the effective date of the rules adopting the revised compliance benchmarks are established. As discussed above, deliberation on some or all of these issues may appropriately begin before the official data gathering period in years four and five.

The Parties agree that it would be prudent for the task force to consider the definition of HAC for purposes of a wireless handset's compliance with the Commission's rules. The task force should consider which data would be needed to determine if the existing definition of HAC is the most effective means for ensuring access to wireless handsets for consumers who use hearing aids and encourages technological innovation and advancement. Examination of the meaning of HAC-compliance for wireless handsets beyond the M and T rating system currently found in the Commission's rules may play a significant role in the ultimate determination of whether the goal of 100% compliance is achievable.

As the Commission stated in the *NPRM*, thoughtful consideration should be given to whether the 100% goal, if deemed achievable, could be satisfied via “innovative approaches, including standards or technologies that are different from the currently applicable ANSI standard that can achieve telephone access for consumers with hearing loss”<sup>9</sup> The current ANSI rating system has provided consumers with an easy-to-understand model for years. However, thought can and should be given to whether a metric other than measuring RF emissions or inductive coupling can be used to measure the compatibility between a wireless handset and a hearing aid device. Consideration should also be given to whether use of innovative measures beyond the current M and T rating system will incentivize wireless handset manufacturers to think more creatively about handset accessibility. In order to minimize any duplication of efforts, the task force will work cooperatively with appropriate technical standards-setting bodies and ensure consistency with technical standards where possible. The task force is an appropriate forum for discussion of this issue, which will include

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<sup>8</sup> *Id.*

<sup>9</sup> *NPRM* ¶ 77; see also Consensus Proposal at 2 (urging the Commission to “seek comment on whether wireless handsets can be deemed compliant with the HAC rules through means other than by measuring RF interference and inductive coupling”).

consideration of technical flexibility and feasibility as well as consumer accessibility and usability.

In undertaking the evaluation of the definition of HAC, the task force must take a holistic view of conditions in the wireless and hearing aid industries as they exist at the time of the determination process review. In the intervening time between when the Commission potentially adopts a goal of 100% HAC compliance in these proceedings and when the task force reviews the achievability of that goal in years four and five, the market for both wireless technologies and hearing aid devices will naturally evolve. Indeed, there has already been tremendous innovation in wireless handsets in the last decade, and there is no sign of it slowing in the near future. Innovative accessibility solutions that would otherwise have developed in the market should therefore not be thwarted or discouraged leading up to the task force review process in years four and five.

Additionally, the task force should consider how to ensure that the HAC rating system is effective in helping consumers who use hearing aid devices identify both the hearing aid and mobile devices that will meet their unique needs. The wireless industry and the hearing aid industry have coordinated roles in addressing the successful interaction between a wireless handset and a hearing aid device. Specifically, the current HAC rating and disclosure system requires that both parties to the HAC equation take steps to not only ensure compatibility between the wireless and hearing aid devices, but also to educate consumers about that compatibility so they may make informed choices in selecting devices that meet their needs. Indeed, multiple factors must be accounted for in addition to a wireless handset's HAC rating – e.g., the consumer's unique experience and needs, the immunity of the hearing aid device to RF interference, and consumer awareness about the HAC rating system.

The issue of hearing aid compatibility requires consideration of each of these aspects of the ecosystem and a balance between the roles of both industries and technologies involved. The task force, as described above, will be in a good position to carefully address this issue. Further, in examining the state of the wireless and hearing aid industries, the task force should bear in mind that new standards may need to be developed for ensuring HAC compliance on new equipment.<sup>10</sup> Testing protocols for new air interfaces take time to develop and are a key component of ensuring that new technologies – including those for persons who use hearing aids – are available to consumers. While the task force need not develop the standards itself, it must be cognizant of the need for testing protocols when considering any timelines for HAC compliance. Thoughtful consideration of this issue will help ensure that new air interfaces can be rapidly introduced into the market for the benefit of all consumers.

Finally, the task force should also consider the implementation process. The Parties previously agreed that the new benchmarks, including the 100% compliance

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<sup>10</sup> See Consensus Proposal at 1, n.1 (stating the Parties' agreement that the benchmarks, if adopted, "should only be applicable if testing protocols are available for a particular air interface"). The Parties further clarify that this applies to the benchmarks as well as the 100% compliance requirement, if deemed achievable.

requirement, if deemed achievable, would apply to both manufacturers and wireless carriers.<sup>11</sup> The task force should, in making its determination, carefully consider requiring 100% compliance with the Commission's HAC rules on both equipment manufacturers and wireless carriers and should keep in mind the extended compliance time frame for nationwide and non-nationwide carriers alike.

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The undersigned Parties are pleased to submit this additional collaborative filing to the Commission. The consensus-based proposals herein, in addition to those already detailed in the Consensus Proposal, will further our shared goal of providing accessible wireless equipment and services to all Americans, including those who use hearing aid devices. We therefore respectfully urge the Commission to adopt the Consensus Proposal consistent with these agreed-upon details without modification in its rulemaking proceeding.

Sincerely,

James Reid  
Senior Vice President, Government Affairs  
Telecommunications Industry Association

Barbara Kelley  
Executive Director  
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Cc: Chairman Tom Wheeler  
Commissioner Mignon Clyburn  
Commissioner Jessica Rosenworcel  
Commissioner Ajit Pai  
Commissioner Michael O'Rielly  
Jon Wilkins, Bureau Chief, WTB  
Chad Breckinridge, Associate Bureau Chief, WTB  
Alison Kutler, Bureau Chief, CGB  
Karen Peltz Strauss, Deputy Bureau Chief, CGB

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<sup>11</sup> As the Parties previously stated, the new benchmarks "should directly apply to manufacturers and carriers that offer six or more digital wireless handsets in an air interface, with additional compliance periods for Tier I and Non-Tier I carriers of six months and eighteen months, respectively, to account for carriers' availability of handsets and inventory turn-over rates." See Consensus Proposal at 1, n.1. The Parties further clarify that this applies to the benchmarks as well as the 100% compliance requirement, if deemed achievable.